

RECONCILING LAW AND MORALITY IN A SECULAR LEGAL SYSTEM: CHRISTIAN AND JEWISH APPROACHES TO LAWYERS' ETHICS

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I THE INTERSECTION OF LAW AND MORALITY IN A SECULAR LEGAL SYSTEM

Widespread media and public attention has recently been devoted to questioning the actions of the Catholic Church and its lawyers in choosing to zealously defend allegations of child sexual abuse, even when the Church's own processes have found that the abuse has likely occurred.¹

Public fascination with the case has arisen not just because of the nature of the abuse itself, but because of how the Church as a 'moral' and religious institution was seen to have pursued all defences available within the secular legal system with seeming disregard for the interests of the victims or the Church's own moral values. The Church, when questioned, blamed its lawyers, suggesting that it only adopted the zealous tactics it did because its lawyers told it to.²

One perspective is that, in a modern legal system, a defendant (even a church) and its lawyers are entitled to pursue all available defences within the bounds of the law. Indeed, in his evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse, Cardinal Pell himself argued that:

as an Australian citizen, the church has the same rights as any other citizen. In other words, we have every right to defend ourselves in law, we

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1 See, eg. Australian Broadcasting Corporation, 'In the Name of the Law', *Four Corners*, 11 August 2014 <<http://www.abc.net.au/4corners/stories/2014/08/11/4062942.htm>>; Richard Ackland, 'Questionable Ethics of Pell's Lawyers under Scrutiny', *The Sydney Morning Herald* (Sydney), 28 March 2014, 29; Vivien Holmes, 'Pell Was Wrong to Blame the Lawyers, but They Aren't Blameless', *The Conversation* (online), 3 April 2014 <<http://theconversation.com/pell-was-wrong-to-blame-the-lawyers-but-they-arent-blameless-25016>>; David Marr, 'The Prince: Faith, Abuse and George Pell' [2013] (51) *Quarterly Essay* 1, 76; Vivien Holmes, 'Compounding the Abuse: Lawyers for the Catholic Church in the Ellis Case' (2014) 17 *Legal Ethics* 433. See also Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia, Sydney, 18 March 2014, 5939–41, 5947–9 (Paul Richard McCann).

2 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia, Sydney, 24 March 2014, 6352 (George Pell); Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia, Sydney, 25 March 2014, 6368–9 (John Joseph Usher). See also Ackland, above n 1.

have every right to do that and we have done that, recognising the legal — we didn't devise the law — the legal limitations.³

From this perspective, if a defendant's choice to avail itself of all available defences leads to an unjust outcome, then it is the fault of the law, and not necessarily that of the defendant or indeed its lawyers.⁴ Here however, the Church (and potentially its lawyers) were expected to bring a critical moral perspective to its dealings with the secular state, in the form of its legal system.

Whilst this is a specific example of a particular interaction of church and state in a modern legal system, questions about how to reconcile 'law' and 'morality' are also faced by Christian and Jewish lawyers, who owe contemporaneous obligations to church and state and must reconcile these potentially competing duties on a daily basis when making ethical decisions in legal practice.

The Catholic Church scenario, and the potentially conflicting professional and religious obligations of Christian and Jewish lawyers, highlight some interesting questions about the intersection of law and morality in a secular legal system, and in particular:

1. What scope is there within a secular legal system to draw from religious moral values when law runs out or leads to an unjust outcome?
2. Can the ethical values of church and state coexist within a secular liberal legal system?

In this paper I will explore these questions in the context of the lawyer's role, looking at the normative literature about lawyers' ethical decision-making from the perspective of the Christian and Jewish faiths.⁵ I will identify four approaches within this literature to reconciling the competing ethical norms of church and state in a secular legal system. These approaches are:

1. the Servant Lawyer;
2. the Lawyer of Character;
3. the Lawyer of Integrity; and
4. the Prophetic Lawyer.

3 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia, Sydney, 24 March 2014, 6355 (George Pell). Cardinal Pell continued, '[a]s well as that, we recognise our moral obligations, and these are met with money in a non-legal way'.

4 See Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' [1986] *American Bar Foundation Research Journal* 613, 616–17, 634. Pepper argues, for example, that requiring lawyers to have moral responsibility for acts undertaken in the professional role would eventually lead to 'an oligarchy of lawyers' and that, from the perspective of his liberal 'first-class citizenship model', unfettered access to law and autonomy are 'moral goods' whose value in essence outweighs the risk of the 'immoral' client who may wish to pursue the law to its limits: at 615, 617. See also Monroe H Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191, 204; Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate, 2009) 4.

5 There is a large body of literature on lawyers' ethics, including from diverse religious perspectives. It would not be possible to do justice to this literature within the scope of this article, so I have narrowed the focus to Christian and Jewish perspectives.

II BACKGROUND TO THE LITERATURE ON LAWYERS' ETHICAL DECISION-MAKING

Lawyers make a broad range of ethical decisions in legal practice. These range from 'smaller' decisions such as the tone of a letter,⁶ to 'larger' decisions such as whether to accept instructions to act for a particular client, and decisions about the scope of the lawyer-client relationship.

Although some of these decisions are restricted or guided by the body of formal professional conduct rules, it is recognised that these rules cannot cover the broad range of ethical decisions that are made daily by lawyers in practice and that the rules consequently leave a large space within which lawyers exercise a broad discretion to make ethical decisions.⁷ The extent to which lawyers ought to draw from other values to guide them in their ethical deliberations within this space has been the focus of increasing scholarship by legal ethicists since the publication of Richard Wasserstrom's seminal article, 'Lawyers as Professionals: Some Moral Issues' in the 1970s.⁸

In 2004, Professor Christine Parker examined the growing body of predominantly secular normative literature on lawyers' ethical decision-making, and identified four distinct approaches within that literature,⁹ namely:

1. the *Adversarial Advocate*, in which the lawyer's role in an adversarial liberal legal system justifies setting aside all values external to the interests and instructions of the client in making ethical decisions;¹⁰
2. the *Responsible Lawyer*, in which the lawyer owes a 'higher' duty to justice and the legal system, and must take those values into account in making ethical decisions.¹¹ The name of this approach does not necessarily suggest that other approaches are not responsible. It reflects the theory of Professor William Simon,¹² which is indebted to the principles-oriented jurisprudence of Professor Ronald Dworkin;¹³

6 Michael Robertson and Kieran Tranter, 'Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work' (2006) 9 *Legal Ethics* 211, 224.

7 Ibid; Geoffrey C Hazard Jr, 'Ethical Opportunity in the Practice of Law' (1990) 27 *San Diego Law Review* 127, 135.

8 Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.

9 Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49; see also Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 12.

10 Parker, above n 9, 56. With some exceptions however, for example, Monroe Freedman allows the lawyer to make a moral choice when deciding whether to accept instructions to act in the first place, but not once those instructions have been accepted: Freedman, above n 4, 204.

11 Parker, above n 9, 56.

12 William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998); William H Simon, 'Ethics, Professionalism, and Meaningful Work' (1997) 26 *Hofstra Law Review* 445.

13 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978); Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998). Simon expressly states his reliance on Dworkin: Simon, *The Practice of Justice*, above n 12, 247, see also 39, 82, 91, 126, 243–4.

3. *Moral Activist*, in which the lawyer's ethical deliberations are shaped by 'social and political conceptions of justice, moral philosophy and promotion of substantive justice';¹⁴ and
4. *Ethics of Care*, in which the lawyer takes into account broader values, including '[r]esponsibilities to people, communities and relationships',¹⁵ in making ethical decisions.¹⁶

These approaches are not exhaustive, and other approaches have also been identified.¹⁷

Whilst these approaches deal with questions about how to reconcile law and other values (and may have parallels with some of the faith-based models in terms of their overall approach to whether and how particular values ought to influence lawyers' ethical deliberations), it is necessary to look beyond these models when exploring questions about whether the ethical values of church and state can coexist in a secular legal system.

The Adversarial Advocate model (which Parker identifies as the 'predominant' conception of lawyers' ethics)¹⁸ for example, would simply require lawyers of faith to set aside religious moral values when engaged in the professional role. Whilst this is compatible with a theological perspective that regards the ethical worlds of church and state as being appropriately separate,¹⁹ and may be a way in which lawyers seek to reconcile personal and professional roles in practice,²⁰ it is to some extent an inadequate model for reconciling religious and professional values. This is because it fails to recognise that the Christian or Jewish lawyer's obligation to God transcends the different roles that she may hold,²¹ and in effect requires her to deny rather than reconcile her identity as a member of the church with her identity as a lawyer. For the lawyer of faith, this separation or compartmentalisation of roles is artificial,²² and 'results in a sort of schizophrenia'.²³ It is interesting to note that, in the example of the Catholic Church and its lawyers, the Church's identity as church could not be separated or denied, and its failure to act consistently with

14 Parker, above n 9, 56.

15 Ibid.

16 One of the theorists whom Parker classifies as fitting within this approach is Thomas L Shaffer. Shaffer writes from a Christian perspective, and his work will be considered further in the analysis of faith-based approaches to lawyers' ethical deliberations, below.

17 For example, the virtue ethics approach exemplified by Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press, 1993); see also Parker and Evans, above n 9, 9–10.

18 Parker and Evans, above n 9, 20.

19 For example a Lutheran 'Two-Kingdoms' approach as described in Thomas L Shaffer, 'The Legal Ethics of the Two Kingdoms' (1983) 17 *Valparaiso University Law Review* 1, 12.

20 See, eg, Parker's 'Separation' model in Christine Parker, 'Christian Ethics in Legal Practice: Connecting Faith and Practice' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005) 23, 27.

21 Reid Mortensen, 'Agency, Autonomy and a Theology for Legal Practice' (2002) 14 *Bond Law Review* 391, 406, 408; Joseph G Allegretti, *The Lawyer's Calling: Christian Faith and Legal Practice* (Paulist Press, 1996) 22–3.

22 Michael P Schutt, *Redeeming Law: Christian Calling and the Legal Profession* (InterVarsity Press, 2007) 77.

23 Ibid.

that identity was part of what gave rise to public criticism. This is consistent with Michael Schutt's argument that a comprehensive model for faith-based legal practice must allow the lawyer to act with integrity in both personal and professional roles.²⁴

Further, the literature on lawyers' ethical decision-making from the perspective of the Christian and Jewish faiths provides a different perspective to the general ethics literature in that, rather than considering whether or what values lawyers should draw from to guide them in their ethical deliberations, it recognises that the primary question for lawyers of faith is about how to reconcile two sometimes competing sets of values and obligations (the ethical values of church and state). Whilst this is specifically relevant to lawyers of faith, the faith-based models may have broader application to any lawyer who struggles to reconcile the competing values and interests that are inherent in ethical decision-making in legal practice.²⁵

This article will add to the models identified by Parker and will also highlight where the philosophical justifications for the various models reflect key differences between the traditional liberal view of law and the lawyer's role, and that taken by the different pre-modern, enlightenment, religious and post-modern philosophies that inform the faith-based approaches to lawyers' ethical decision-making.

III THE SERVANT LAWYER

*'So then, the law is holy, and the commandment is holy, righteous and good.'*²⁶

The Servant Lawyer recognises the lawyer's professional role and many professional values as being broadly consistent with Jewish and Christian religious tradition, such that there is no significant conflict between faith and legal practice. The Jewish or Christian lawyer is therefore morally justified in engaging in legal practice and adopting professional ethical norms in doing so. As DiSalvo and Droel have identified:

many lawyers believe that the legal system is a complex, finely tuned, deliberately designed machine that produces justice by applying objectively fair rules to all parties. As a consequence of this theory, individual lawyers understand that they serve the greater good by staying within their respective roles. It is not a breach of their morality to represent civil or criminal clients whose positions or actions, in other settings, would violate their Christian beliefs.²⁷

24 Ibid 92–3.

25 See, eg, Joseph Allegritti, 'Clients, Courts, and Calling: Rethinking the Practice of Law' (2005) 32 *Pepperdine Law Review* 395, 400.

26 *Romans 7:12* (New International Version).

27 Charles R DiSalvo and William L Droel, 'Reflections on the Contents of the Lawyer's Work: Three Models of Spirituality — and Our Struggle with Them' in Thomas E Baker and Timothy W Floyd (eds), *Can a Good Christian Be a Good Lawyer? Homilies, Witnesses, and Reflections* (University of Notre Dame Press, 1998) 127, 129–30.

In other words, the lawyer's role is justified by faith-based values, but the way the religious lawyer conducts her practice is framed by professional rather than religious ethical norms. In the example of the Church,²⁸ the Servant Lawyer would be justified in engaging in zealous advocacy in defence of her client (regardless of broader moral considerations such as concern for the claimant or other pastoral or reputational considerations) provided that she identifies zealous defence as being justified by professional obligations.

The rationales for the religious justification of the professional role of lawyer vary, but include, for example:

- similarities between professional and faith-based ideals of service,²⁹ including the Christian and Jewish emphasis on serving the poor,³⁰ and professional ideals of pro bono service;

28 It is not known whether the lawyers asked to represent the Catholic Church were Catholic themselves (although one of the lawyers has close ties to the Vatican, having 'conducted a Canonical inquiry' on its behalf). See Gadens, *John Dalzell* <<http://www.gadens.com/whoware/ourpeople/pages/John-Dalzell.aspx>>. The details of this inquiry are not publically available as canonical procedures are generally required to be confidential, however persons recognised canonically by the Church and laypersons holding office within the Church are generally required to be in communion with the Church. See Catholic Bishops' Conference of England and Wales, *Directory on the Canonical Status of the Clergy: Rights, Obligations and Procedures* (Catholic Truth Society, 2009) 49; James A Coriden, *An Introduction to Canon Law* (Paulist Press, revised ed, 2004) 157, 162. Had the lawyers been members of the Church, then the question about the extent to which the lawyers ought to have had regard to the moral teachings of the Church in their role as the Church's professional legal advisers becomes even more pointed.

29 'Enman, for example, suggests that the practice of law may be a form of ministry, particularly through a commitment to 'establish and maintain laws that are in accord with the biblical understandings of fairness and concern for all people, especially those who are the most vulnerable in society': Fred M Enman, 'Law as Ministry: a Perspective from the Judeo-Christian Tradition' (1992) 35 *Catholic Lawyer* 97, 107. Floyd also notes consistencies between professional and faith-based goals of service: Azizah Y al-Hibri et al, 'Panel Discussion: Does Professionalism Leave Room for Religious Commitment?' (1999) 26 *Fordham Urban Law Journal* 875, 883 (Timothy Floyd). In Australia, this view has also been echoed by former Chief Justice, the Hon Sir Gerard Brennan, who notes that those who 'need the lawyer's skills and knowledge but are unable to obtain them have a moral claim on the services of the profession', and that lawyers have a unique opportunity to exercise Christian charity by providing these services: Sir Gerard Brennan, 'Law, Values and Charity' (2002) 76 *Australian Law Journal* 492, 498. From a Jewish perspective, Russell Pearce identifies that, within the religious lawyering academy, there is a school of thought suggesting that religious lawyering can coexist with professional ethics. Pearce suggests that those in this school argue that (1) 'religious values reinforce professional values'; (2) 'religion and professionalism both develop virtue and character'; and (3) 'nothing in legal ethics prevents lawyers from drawing on religious values': Russell G Pearce, 'Faith and the Lawyer's Practice' (2001) 75 *St. John's Law Review* 277, 279.

30 Russell G Pearce, 'The Jewish Lawyer's Question' (1996) 27 *Texas Tech Law Review* 1259, 1269. Pearce's sixth model of Jewish lawyering, 'Jewish Social Justice Lawyers', consists of Jewish lawyers who are inspired by their faith to advocate for social justice goals on behalf of both Jewish and non-Jewish causes: Russell G Pearce, 'Jewish Lawyering in a Multicultural Society: a Midrash on Levinson' (1993) 14 *Cardozo Law Review* 1613, 1619. Although the pursuit of social justice goals might also fit within the Prophetic model, the pursuit of such goals on behalf of both Jewish and non-Jewish people suggests that, rather than being motivated to change law and legal institutions to reflect faith-based values, these lawyers have been able to justify their professional role with reference to faith-based values. That is, the lawyer's role in promoting social justice may be justified by faith-based values, and is therefore broadly consistent (or at least, not in conflict with) the lawyer's identification as a person of Jewish (or Christian) faith.

- the idea that a religious lawyer acts consistently with faith-based values by carrying out the professional role that she has been given in the world;³¹
- similarities between religious values and the values of modern secular culture;³²
- the view that the principles and values of Western legal democracy (reflected in the lawyer's role), 'reflect moral imperatives' from the Jewish and Christian tradition;³³ and
- a lawyer's sense of identification with a religious community, which may motivate him to act for that community but otherwise has no effect on the way he goes about practising law. Sanford Levinson, for example, identifies that Jewish lawyers (who may be Jewish by religion or by ethnic background)³⁴ in particular may feel a strong sense of identification with the Jewish community and may be motivated to act for that community, but their lawyering may not be any different if they were acting for non-Jewish clients.³⁵

Whilst this model recognises a consistency between the ethical values of church and state in the context of the lawyer's role, conflicts of values may still arise at a practical level. The focus of this model is on reconciling the values of church and state at a broader philosophical level (so that the Servant Lawyer may view her professional role as being generally consistent with her identity as a Christian or Jew), rather than on reconciling conflicts of values that may arise at the coalface of legal practice. Indeed, the moral justification of the lawyer's role (which in turn justifies the Servant Lawyer adopting professional ethical norms when engaged in legal practice), may at times require her to act in ways that might otherwise offend against her own religious moral values.

As an example, British barrister Mark Mullins was disciplined by the Bar Council in 2006 for having refused to accept a brief to act for 'Mr J', an immigrant

31 Jack Sammons, for example, suggests that, in a fallen world, religious lawyers ought to do the best they can in the role they have, and from that perspective, the Christian faith and the professional role are broadly consistent, and there is 'nothing at all wrong with looking deep within the rhetorical tradition of the practice of law for moral guidance on how I should best live my life as a lawyer': Azizah Y al-Hibri et al, above n 29, 881 (Jack L Sammons).

32 Allegretti, above n 21, 14 — from a Christian perspective. From a Jewish perspective, Pearce identifies a version of Judaism that 'identifies the religious with the public' and 'involves going "out into the world," but in so doing identifies American values, including the professional project, as being identical with Jewish values': Pearce, 'The Jewish Lawyer's Question', above n 30, 1265.

33 Monroe H Freedman, 'Legal Ethics from a Jewish Perspective' (1996) 27 *Texas Tech Law Review* 1131, 1131.

34 See, eg, Sanford Levinson, 'Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity' (1993) 14 *Cardozo Law Review* 1577; Pearce, 'The Jewish Lawyer's Question', above n 30, 1260. The distinction between 'Jewishness' as an ethnicity and as a religion is also reflected in anti-discrimination law, in which 'Jews' receive protection as a 'race'. See, eg, *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537; *Phillips v Aboriginal Legal Service* [1993] EOC 92-502.

35 Levinson, above n 34, 1590–1. Levinson describes this model as 'Jewish Lawyering as an Expression of Social and Political Solidarity'. See also Pearce, 'The Jewish Lawyer's Question', above n 30, 1264, '[t]hese ethnic Jewish identifications may influence the causes Jewish lawyers adopt, but do not otherwise influence how a lawyer engages in practice'.

seeking to remain in the UK 'on the basis of his sexual relationship with his male partner'.³⁶ Mr Mullins, a practising Christian, saw a conflict between his professional role and his own moral values and refused to act further. Conversely, when conflicts arise at the coalface of legal practice, the Servant Lawyer is able to rely on the idea that her role as a lawyer is broadly justified from the perspective of her church, and this in turn justifies her acting for clients and in matters that might otherwise offend against her own values.³⁷

The Servant Lawyer is similar to Parker's Adversarial Advocate,³⁸ in that both models justify the lawyer adopting professional ethical norms and largely remaining morally neutral when engaged in legal practice. However, whereas the Servant Lawyer model seeks to provide a religious justification for remaining morally neutral, the Adversarial Advocate is justified by liberal philosophy, namely the importance of giving effect to the client's individual autonomy by providing access to law without moral judgment.³⁹

Interestingly, Freedman (whose liberal theory of lawyers' ethics underpins the Adversarial Advocate model) argues that the separation of law and morality⁴⁰ in legal practice is justified by both liberal philosophy and religious tradition, on the basis of a shared recognition of the importance of autonomy.⁴¹ However, as Mortensen identifies, although both liberal and Christian traditions share a level of support for individual autonomy,⁴² the Christian's autonomy is ultimately bounded by her obligation to God.⁴³ This difference is reflected in the faith-based literature, which, whilst recognising that one of the ways that a Christian or Jewish lawyer might reconcile competing obligations to church and state is by

36 This is the only example of a barrister having been disciplined for breaching the Cab Rank Rule found by Flood and Hvid in their 2013 inquiry into the current meaning and purpose of the Cab Rank Rule: John Flood and Morten Hvid, 'The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market' (Research Paper No 13-01, University of Westminster, 22 January 2013), 40 <<http://ssrn.com/abstract=2229235>>. The disciplinary report itself is no longer available, but a summary of the case is available at James Mills, 'Barrister Who Refused to Represent Gay Client Reprimanded', *Daily Mail* (online), 26 July 2006 <<http://www.dailymail.co.uk/news/article-397625/Barrister-refused-represent-gay-client-reprimanded.html>>.

37 I use the example of the lawyer refusing to act for 'Mr J' because it is a reported example of a conflict between a lawyer's obligations to church and state (as perceived by that lawyer) at the coal face of legal practice, and not because I in any way suggest that this particular lawyer's views or actions are reflective of Christian or Jewish lawyers more broadly.

38 Parker, above n 9, 57-60; Parker and Evans, above n 9, 22-9. The Adversarial Advocate is thought to give effect to the client's autonomy by following client instructions (within the bounds of the law), and bears no personal moral responsibility for the outcome.

39 See, eg, Pepper, above n 4, 617; Freedman, above n 4, 200, 203; Monroe H Freedman, 'In Praise of Overzealous Representation — Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct' (2006) 34 *Hofstra Law Review* 771.

40 In terms of the lawyer being required to set aside personal values when engaged in the practice of law.

41 Freedman, above n 34, 1133-4, with an appeal to Jewish tradition which Freedman argues values compassion for one's fellow man, individual autonomy, and equal protection under law. See also Freedman, above n 4, 191 quoting *Pacem in Terris*, Encyclical Letter of Pope John XXIII [34] (11 April 1963), in which Freedman refers to the importance placed on human dignity in the Catholic tradition, and argues that, in order to provide clients with human dignity, a lawyer must provide her client with autonomy, performing her professional role without moral judgment.

42 But disagree as to the source of that autonomy: Mortensen, above n 21, 404.

43 Ibid 403.

remaining morally neutral when engaged in the professional role, nevertheless recognises that there may be a point at which an action required to be undertaken in the professional role will be 'religiously impossible';⁴⁴ the Servant Lawyer will be unable to remain morally neutral, and will need to choose church over state (as in the example of the lawyer asked to represent 'Mr J').

Mortensen also argues that a Christian philosophy of lawyers' ethics must recognise the autonomy of the lawyer in addition to that of the client, which may require that the lawyer be allowed some moral input into the professional role.⁴⁵ To that end, Mortensen recognises that the lawyer ought to be able to discuss moral concerns with the client; albeit cautiously and sensitively.⁴⁶ Freedman's liberal theory recognises the lawyer's autonomy to a more limited extent, allowing a lawyer to exercise moral choice in whether to accept instructions to act in the first place, but reinforces that, once those instructions have been accepted, the lawyer must represent the client to the best of her ability, regardless of any moral qualms.⁴⁷ In this way, the lawyer is effectively able to make a decision, at the start of a representation, whether she will be able to remain morally neutral and, if not, to decline the representation at the outset.

IV THE LAWYER OF CHARACTER

*'May the LORD give you discretion and understanding when he puts you in command over Israel, so that you may keep the law of the LORD your God.'*⁴⁸

Rather than recognising a consistency between religious and professional justifications for the lawyer's role itself, the Lawyer of Character recognises a consistency between professional and religious character qualities (or 'virtues'), such as honesty, integrity and wisdom. The Lawyer of Character is thus able to reconcile her dual role as a representative of both church and state by bringing her good character, emphasised by and developed through religious adherence and practice, to bear on her everyday work, and further strengthening her character through legal practice.

This approach is reflected in the writings of Christian ethicist Timothy Floyd, who suggests similarities between the religious and professional emphasis on

44 The phrase 'religiously impossible' is used by Jewish theorist Marc D Stern 'The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness' (1996) 27 *Texas Tech Law Review* 1363, 1371. From a Jewish perspective, Stern suggests that a lawyer must separate her religious values from her professional role, but concedes that some clients or matters will be 'religiously impossible' for the lawyer to act for or in, and the lawyer should either refuse to accept instructions or withdraw from acting for the benefit of the client. See also Parker, above n 20, 27, who suggests that even lawyers who seek to reconcile any conflict between professional role and personal values by acting piously in their personal lives, but keeping their personal values relatively separate at work, would still draw the line at behaviour that is 'actively immoral'.

45 Mortensen, above n 21, 404.

46 Ibid 407–8.

47 Freedman, above n 4, 204.

48 1 *Chronicles* 22:12 (New International Version).

character and virtue and moreover, that the practice of law can therefore be a calling in which religious lawyers are encouraged to develop and build virtue and good character.⁴⁹ Similarly, Amelia Uelmen, who suggests that large law firm environments in particular may not encourage lawyers to bring their personal religious values into the workplace,⁵⁰ nevertheless suggests that there is room for a lawyer practising in such an environment to exercise faith-inspired virtues such as 'honesty, personal integrity and a sense of humanity in the day-to-day tasks of research, gathering and analysing facts and drafting pleadings and briefs'.⁵¹

Some of the character qualities which have been identified as having parallels across both professional and religious spheres include:⁵²

- civility;⁵³
- practical wisdom, or the ability to deliberate well;⁵⁴
- the ability to make mistakes and to learn from them;⁵⁵
- an openness to reconsider one's own values or morals and to learn from others within the community;⁵⁶
- a willingness to acknowledge one's heritage and community and to remind that community what its values are (including the community of the profession);⁵⁷
- the ability to treat each person with dignity;⁵⁸
- tolerance;⁵⁹

49 Timothy W Floyd, 'The Practice of Law as a Vocation or Calling' (1998) 66 *Fordham Law Review* 1405, 1413–15.

50 Uelmen suggests that this is because large law firms have a 'public square' etiquette which discourages lawyers from pursuing their personal beliefs in the workplace and also because work in a large law firm is more likely to be piecemeal, with consequently less matter control and client involvement for individual lawyers: Amelia J Uelmen, 'Can a Religious Person Be a Big Firm Litigator?' (1998) 26 *Fordham Urban Law Journal* 1069, 1072–3.

51 Ibid 1105; a similar view is put forward by Jack L Sammons (an Anglican theorist) who suggests that the virtue of character is common to both professional and personal spheres and that it is therefore not a matter of a lawyer seeking to keep these spheres separate or trying to bring her Christianity into the practice of law, but rather a matter of developing and exercising good character in both personal and professional roles: Jack L Sammons, 'On Being a Good Christian and a Good Lawyer: God, Man, Law, Lawyering, Sandy Koufax, Roger Maris, Orel Hershisier, Looking at the Catcher, and Corked Bats in The Kingdom (with a Brief Guest Appearance by Ty Cobb)' (1996) 27 *Texas Tech Law Review* 1319.

52 Thomas L Shaffer and Mary M Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* (University of Notre Dame Press, 1991) 39, 84. See also Thomas L. Shaffer, 'The Moral Theology of Atticus Finch' 42 (1980–1981) *University of Pittsburgh Law Review* 181; Thomas L Shaffer, 'Lawyers as Prophets' (2002–2003) 15 *St Thomas Law Review* 469.

53 Ibid 43.

54 Ibid 44.

55 Ibid 37–8.

56 Ibid 45–6.

57 Ibid 56–7, 78.

58 Ibid 70.

59 Ibid 75.

- integrity;⁶⁰
- honesty, courage and the ability to tell the truth;⁶¹ and
- sympathy, including care.⁶²

This model has some parallels with secular ‘virtue ethics’ approaches such as that of Anthony Kronman, whose ‘Lawyer-Statesman’ framework emphasises character and the development of *phronesis*, or practical wisdom.⁶³ For both frameworks, legal institutions are accepted as being what they are, and guidance for ethical decision-making is primarily sought from legal institutions and rules.⁶⁴ However, the individual in her personal life and through the professional role is focused on becoming a person of good character, and brings this character to bear in carrying out the professional role.⁶⁵

The shared emphasis on virtue in both secular and religious approaches to lawyers’ ethics reflects the influence of Aristotelian philosophy on virtue ethics theories,⁶⁶ as well as on Christian legal philosophy, through Christian philosophers such as Thomas Aquinas and Richard Hooker.⁶⁷ Interestingly, the emphasis on faith affecting character which is then brought to bear on the professional role is not a dominant feature of the scholarship on Jewish approaches to lawyers’ ethics. Levinson writes that in his classification of approaches to Jewish lawyering, he deliberately did not include an approach in which the lawyer would seek to practise law in accordance with Jewish values, due to the difficulty of identifying specific or exclusively Jewish values.⁶⁸ Again, and whilst the Christian literature does not identify the values and virtues listed above as being exclusively Christian, this may also reflect the greater influence of Aristotelian philosophy on Christian legal philosophy.

The Lawyer of Character also reflects a level of theological comfort with the separation of the roles of church (individual morality) and state (government, business, law et cetera). James Barr suggests, for example, that in some fundamentalist evangelical religious groups, the role of the church is directed at maintaining individual morality rather than examining or reforming social or political institutions.⁶⁹ Barr suggests that in these groups:

60 Ibid 75, 78.

61 Shaffer and Shaffer emphasise the lawyer’s ability to call the law, legal institutions and the community to account if they do not meet with community values, and to identify and be honest about mistakes: Shaffer and Shaffer, above n 52, 75–8.

62 Reid Mortensen, ‘The Lawyer as Parent: Sympathy, Care and Character in Lawyers’ Ethics’ (2009) 12 *Legal Ethics* 1, 6.

63 Kronman, above n 17, 11–17; Parker and Evans, above n 9, 9–10.

64 See William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 1998) 9–11, 138–69 who argues that lawyers ought to make a ‘contextual’ judgment about the substance of the law, and act accordingly; Parker and Evans classify this approach to ethical decision-making as ‘responsible lawyering’: Parker and Evans, above n 9, 36.

65 Kronman, above n 17, 11–17; Parker and Evans, above n 9, 9–10.

66 Parker and Evans, above n 9, 9.

67 See, eg, the explanation of Christian natural law in Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2nd ed, 2013) 149–59.

68 Levinson, above n 34, 1584.

69 James Barr, *Fundamentalism* (SCM Press, 2nd ed, 1981) 115.

The dedicated Christian through his personal involvement in industry, in business and so on will then bring his witness to bear upon all sorts of relations in which he lives and works: this is much better than that the church as church should involve itself in saying what should or should not be done in the complicated and ever-changing social scene.⁷⁰

That is, save for character qualities which traverse both law and morality, the spheres of influence of church and state are regarded as being appropriately separate. For the Lawyer of Character, this would seem to mean that she would approach her professional role without intentionally reflecting on its morality, but with an acceptance that her sense of ethics or good character might organically influence her approach to that work.

In terms of ethical decision-making at the coal face, much depends on the individual lawyer's personal judgment about how the qualities of good character are to be weighed and balanced in different scenarios. In acting for the Church against allegations of abuse, for example, the Lawyer of Character would be required to make an individual judgment about how to give effect to values such as dignity and respect for the claimant, whilst also remaining loyal to her client and demonstrating candour to the court. In her representation of 'Mr J', she might also be less concerned about any conflict with her own moral values; instead giving effect to broader faith-based values by focusing on conducting her representation with integrity and candour.

V THE LAWYER OF INTEGRITY

*'[B]ut whose delight is in the law of the LORD, and who meditates on his law day and night.'*⁷¹

The Lawyer of Integrity⁷² insists on the complete convergence of law and morality, resulting in the rejection of traditional justifications for the lawyer's role and secular liberal values such as individual autonomy.⁷³ Under this model, the lawyer's role is given the religious justification of a calling or vocation. That is, the lawyer is called to her role, and in turn sees that her professional role is not

70 Ibid 113.

71 *Psalm* 1:2 (New International Version).

72 Schutt describes his model for legal practice as 'The Integrated Lawyer': Schutt, above n 22, 93. See also Allegretti, above n 21, 22.

73 Such as the nature or complexity of the adversary system. Shaffer, for example, argues that the 'nature of the system'-type justifications rely on the morality of the adversary system, which Christian lawyers should not simply accept the 'goodness' of the system, but instead need to look critically at the law and at legal institutions within the context of the norms and values of their faith. He writes that:

The moral justification for serving the system is that the system is a source of goodness. But generalized, principled fealty to the system is fealty to power, which assumes that power is the way to goodness. The assumption that power is the way to goodness is not truthful; it depends on a delusion about people — clients and lawyers — and a delusion as well about society and its history, about government, and about the nature of worldly kingdoms.

Thomas L Shaffer, 'The Practice of Law as Moral Discourse' (1979) 55 *Notre Dame Lawyer* 231, 238; see also Shaffer and Shaffer, 'American Lawyers', above n 52, 206.

something that can or should be separated from her identity as a representative of the church.⁷⁴ Moreover, for the Lawyer of Integrity, law and morality are ‘inextricably entwined’⁷⁵ and any actions undertaken as a representative of the state must also be morally justified from the perspective of her faith.⁷⁶

In the example of a lawyer asked to act for the Church against allegations of abuse, the Lawyer of Integrity would deliberately reflect on faith-based moral values in determining how to approach the defence of the Church, and, most importantly, would remain morally accountable for her decisions and actions undertaken in the professional role. For such a lawyer, it would not be sufficient justification to argue that a zealous litigation strategy was permissible under law or undertaken on client instructions.⁷⁷ Rather, the lawyer would need to consider her actions carefully, and ensure their consistency with the ethical norms of her faith.⁷⁸

Only actions evaluated as consistent with the Lawyer of Integrity’s identity as a representative of her faith can be undertaken in her professional role as an advocate within a secular legal system. This does not necessarily mean that ‘zealous’ tactics are never justified for the Lawyer of Integrity. Stanford, for example, suggests that when acting for someone accused of a criminal offence, a lawyer ought to use all available (and legally permissible) tactics, providing that the lawyer faithfully reflects on the representation and tactics before engaging in them.⁷⁹ Unlike the zealous advocacy that is sometimes justified for the Adversarial Advocate because of the adversarial nature of the legal system, however, zealous

74 Shaffer, for example, suggests that a Christian lawyer ‘is a person who has come to suggest (or to hear the suggestion) that one of the many things a Jew or a Christian can do in the world is to qualify for the legal profession. She then goes out, from the religious community and with encouragement from the religious community, to learn and practice law’: Thomas L Shaffer, ‘The Biblical Prophets as Lawyers for the Poor’ (2003) 31 *Fordham Urban Law Journal* 15, 198.

75 Allegretti, above n 21, 33.

76 Schutt, for example, argues that whether and which considerations to raise with clients, which tactics are appropriate, or whether to take on a case in the first place are all ethical decisions which are to be made in accordance with the lawyer’s personal and faith-based canons of conduct. See Schutt, above n 22.

77 See, eg, Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia, Sydney, 18 March 2014, 5877, 5947–5956 (Paul McCann).

78 Schutt, above n 22, 254. See also Larry O Natt Gantt II, ‘Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counselling in the Attorney-Client Relationship’ (2003–04) 16 *Regent University Law Review* 233, 248; John W Stanford, ‘The Christian Lawyer: Defending Apparently Guilty Defendants and Using Deceptive Courtroom Strategies and Tactics’ (2003–04) 16 *Regent University Law Review* 275, 283–4; Samuel J Levine, ‘A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics, and Tradition: A Conceptual Overview’ (2006) 20 *Notre Dame Journal of Law, Ethics & Public Policy* 11, 23–7; Samuel J Levine, ‘Reflections on the Practice of Law as a Religious Calling, From a Perspective of Jewish Law and Ethics, (2005) 32 *Pepperdine Law Review* 411, 416–7; Simon Yeznig Balian, ‘Personal Responsibility for Professional Actions’ (1988–89) 32 *Catholic Lawyer* 337, 339. Stanford (writing from an evangelical perspective) suggests that a religious lawyer ought pray about his work, and to seek God’s direction about ethical decisions in legal practice, whilst Levine (writing from a Jewish perspective) also suggests that it may be appropriate for a lawyer to be guided in making ethical decisions about procedural matters by his religious and personal values.

79 Stanford, above n 78, 299.

tactics are only ever justified for the Lawyer of Integrity where these are justified by her faith, and not simply because of her role in the system.⁸⁰

When irreconcilable conflicts arise between law and morality, the Lawyer of Integrity must reject state in favour of church, and is morally justified in refusing to act or withdrawing from acting further (albeit after considerable discussions with the client).⁸¹ Whilst this may ultimately result in the rejection of the client's autonomy to choose her own path within the bounds of the law, Mortensen argues that the liberal justification of individual autonomy gives rise to a 'paradox' in which the client's autonomy is recognised but the lawyer's is not.⁸² In a sense, the autonomy of both client and lawyer is recognised by the Lawyer of Integrity, in that both parties are encouraged to engage in 'moral conversation' about any conflicts between law and morality,⁸³ but if these ultimately cannot be resolved, then the lawyer may (or at least in some instances, must) withdraw.

It is under this model that the lawyer's refusal to act for 'Mr J' is most likely to be justified. Although Shaffer would require that the Lawyer of Integrity retreat from 'moral isolation'⁸⁴ and discuss her concerns with her potential client first, if the lawyer identifies that she is unable to act for 'Mr J' without compromising her own values, then she is morally justified in refusing to act for 'Mr J', even though this means that he will be denied representation. Mortensen (in relation to divorce lawyers), suggests that this conversation is a 'hazardous exercise' and argues that the lawyer's autonomy to give voice to her own values must be balanced with humility and 'the need for reluctance, and even caution, in exercising moral judgment', given the lawyer's 'bounded knowledge and moral incapacities'.⁸⁵

Insisting on the convergence of law and morality within the lawyer's role also results in a rejection of the traditional concept of the lawyer-client relationship. For the Lawyer of Integrity, this relationship is not purely professional; created and limited by the scope of the retainer, but broader; necessitating care for the client beyond the terms of the client agreement.⁸⁶ This may include, for example, raising relevant non-legal considerations with a client; thinking about the client's needs from a broader perspective (including physical, emotional and financial needs); considering how the legal issue may affect relevant third parties; and the importance of restoring and maintaining relationships.⁸⁷

The lawyer-client relationship may also have a 'personal development' or 'moral growth' component, with Shaffer in particular placing emphasis on the client (and

80 Stanford justifies his view that zealous tactics may sometimes be justified using biblical illustrations, and also because of the 'serious ... position' and implications for the client in a criminal law matter: *ibid* 294.

81 Schutt, above n 22, 251, 253–6; Thomas L Shaffer, *On Being a Christian and a Lawyer* (Brigham Young University Press, 1981) ch 3.

82 Mortensen, above n 21, 403–4.

83 *Ibid*.

84 Thomas L Shaffer, 'The Practice of Law as Moral Discourse' (1979) 55 *Notre Dame Lawyer* 231, 244.

85 Mortensen, above n 21, 407.

86 See, eg, Thomas L Shaffer, *Faith and the Professions* (Brigham Young University Press, 1987) 258–60; Allegretti, above n 21, 44–6; Schutt, above n 22, 228.

87 See, eg, Schutt, above n 22, 246–7; Allegretti, above n 21, 69.

lawyer) becoming ‘better’ as a result of their interactions with each other.⁸⁸ Whilst the emphasis on care and relationship is shared by Parker’s Ethics of Care and the Lawyer of Integrity, the Lawyer of Integrity’s overriding focus is on how to reconcile her competing duties to church and state. Although caring for the client and having regard for the effect of her actions on others is one of the ways in which the Lawyer of Integrity recognises that she can act consistently with faith-based values in her professional role, her ultimate focus must always be on evaluating her actions in the light of her own personal, faith-based moral framework. That is, care stems from the Lawyer of Integrity’s need to act consistently in both personal and professional roles, and is not an end in itself.

Because of its emphasis on care beyond the scope of the client agreement and the dominance of faith-based ethical norms, this model requires the greatest conception of the lawyer’s traditional role. Although the Lawyer of Integrity is advocated by the dominant Christian theorists,⁸⁹ it is criticised by some theorists (including those writing from a faith-based perspective), who note difficulties with a religious lawyer’s professional role being influenced by her personal values to the extent suggested by the ethic of integrity.⁹⁰ Jenkins, for example, argues that clients may prefer a ‘competent’ rather than ‘caring’ lawyer, and that aspects of this model such as the extended relationship between lawyer and client may be more appropriate for certain areas of practice such as family law.⁹¹ This illustrates that there are no easy answers to questions about how to reconcile the competing demands of law (the lawyer’s role) and morality (the lawyer’s obligation to church), and that perhaps the best that can be done is to encourage careful reflection by individual lawyers, with all of the imperfections and ambiguities that that may entail.⁹²

Interestingly, whilst the ethic of integrity features prominently in the Christian literature on lawyers’ ethics, it is not generally reflected in the Jewish literature, and Pearce posits that a Jewish lawyer may feel uncomfortable incorporating religious values into the professional role.⁹³ There may be a number of reasons for the greater prominence of the Lawyer of Integrity in the Christian literature, including the influence of Christianity on the development of Western legal and

88 Shaffer, *On Being a Christian and a Lawyer*, above n 81, ch 3.

89 Particularly Shaffer, Allegretti and Schutt.

90 Stern, for example, notes a number of difficulties with the lawyer’s professional role being influenced by religious values. Namely, that lawyers may not be qualified to provide religious as opposed to legal guidance; that clients come to see lawyers for legal advice and not religious guidance; and that, in focusing on ‘religious principle’ the lawyer may not put the client’s interests first. These concerns are also voiced by other theorists. However, Stern does not require that professional obligation be put before personal values in the event of a conflict between the two, recognising that if an action required by the lawyer’s professional role is ‘religiously impossible’, the religious lawyer may refuse to act or withdraw: see Stern, above n 44, 1371.

91 James M Jenkins, ‘What Does Religion Have to do with Legal Ethics? A Response to Professor Allegretti’ (1998) 66 *Fordham Law Review* 1167, 1168.

92 See, eg, Mortensen, above n 21, 406–7.

93 Pearce, ‘The Jewish Lawyer’s Question’, above n 30, 1261. Pearce suggests that one reason that Jewish lawyers may find the separation of roles appealing is because it avoids group identification and may therefore protect Jewish lawyers from being discriminated against because of their ethnicity or faith: at 1262.

political systems,⁹⁴ perhaps leading to normalisation of the coexistence of church and state, even within the person of the lawyer. In contrast, Pearce and Levinson note a dichotomy between the lawyer's role in Jewish religious courts and the traditional advocate of the Western legal system.⁹⁵

VI THE PROPHETIC LAWYER

*'For Ezra had devoted himself to the study and observance of the Law of the LORD, and to teaching its decrees and laws in Israel.'*⁹⁶

The prophetic model⁹⁷ goes beyond the ethic of integrity by suggesting that a Christian or Jewish lawyer should seek to bring the ethical values from her faith to bear on legal practice in order to change the law, legal institutions and clients for the better. The Prophetic Lawyer is able to do this by acting for clients and organisations who share her values (including Christian or Jewish institutions and individuals),⁹⁸ engaging in law or social reform explicitly or through the matters she takes on; or by engaging in pro bono work.

There is less about this model in the literature because, as Cochran points out, 'poverty law, representation of religious organizations, and religious freedom litigation naturally connect to religious faith',⁹⁹ and some forums therefore make a deliberate choice to focus instead on the intersection between faith and professional role for those lawyers for whom the connection between faith and legal practice is less explicit.¹⁰⁰ In Australia, the majority of lawyers are not engaged in working for religious organisations or clients who necessarily share their faith,¹⁰¹ but must find a way to reconcile their faith with 'what ordinary lawyers do in ordinary law offices on ordinary Wednesday afternoons'.¹⁰² This may be another reason why

94 See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) for a comprehensive discussion.

95 Levinson, above n 34, 1597; Pearce, 'The Jewish Lawyer's Question', above n 30, 1265.

96 *Ezra* 7:10 (New International Version).

97 Both Shaffer and Allegretti deal with the concept of the lawyer as prophet. See Allegretti, above n 21, 51–63; Thomas L Shaffer, 'The Biblical Prophets as Lawyers for the Poor' (2003) 31 *Fordham Urban Law Journal* 15; Thomas L Shaffer 'Business Lawyers, Baseball Players, and the Hebrew Prophets' (2008) 42 *Valparaiso University Law Review* 1063; Thomas L Shaffer, 'Lawyers and the Biblical Prophets' (2003) 17 *Notre Dame Journal of Law, Ethics & Public Policy* 521; Thomas L Shaffer, 'Lawyers as Prophets' (2003) 15 *St. Thomas Law Review* 469.

98 See Pearce, 'The Jewish Lawyer's Question', above n 30, 1263–4; Parker, 'Christian Ethics in Legal Practice', above n 20, 23–34. Others, including Jewish theorist Marc Stern, suggest that religiously motivated legal and political reform is inappropriate: see, eg, Stern, above n 44, 1373.

99 Robert F Cochran Jr, 'Introduction: Can the Ordinary Practice of Law be a Religious Calling?' (2005) 32 *Pepperdine Law Review* 373, 374.

100 Ibid.

101 The Law Society of New South Wales, '2011 Law Society National Profile' (Final Report, May 2012), 12 reported 73 per cent of practising solicitors worked in private practice, 14.8 per cent as corporate solicitors and 9.3 per cent with government. These statistics are not broken down further, and of course, some of the 14.8 per cent working as corporate solicitors work for religious organisations, and some of the 73 per cent in private practice may represent Christian or Jewish clients or causes. Acting only for clients who share the lawyer's faith might also breach anti-discrimination legislation.

102 Cochran, above n 99, 374.

the literature tends to focus on the intersection between faith and the demands of 'ordinary' legal practice. Evans also suggests that lawyers of his acquaintance are generally reluctant to identify a faith-action connection to their legal practice.¹⁰³

Although the Prophetic Lawyer has much in common with the Lawyer of Integrity in terms of the integration of the ethical values of church and state (and the rejection of the separation of roles that may result from Adversarial Advocacy), one of the key differences is that the Lawyer of Integrity is 'salt and light' where she is found.¹⁰⁴ That is, the Lawyer of Integrity is to reflectively do the best that she can in her day-to-day practice, but without actively seeking to change law or legal institutions or to act for particular clients or causes. In contrast, and whilst the Prophetic Lawyer also retains moral responsibility for actions undertaken in the professional role, she discharges this responsibility by intentionally seeking to change the ethical world of law and legal practice for the better, actively pursuing faith-based values through the professional role.

The Prophetic Lawyer may be found working for legal aid or a community legal centre, or acting for particular clients and causes which reflect the lawyer's personal values. Outside her day-to-day legal practice she may become involved in church committees or advising the church about law reform.¹⁰⁵ DiSalvo and Droel say that:

the spirituality of work for such a lawyer will mean vigorously seeking out those clients who are short-changed by the system. It will still mean that aspiring towards greater competency is a basic element of the lawyer's spirituality of work. At the core, however, these lawyers have a very personal regard for integrity and for taking personal responsibility for the consequences of their work.¹⁰⁶

This model may also include those who act for specifically religious organisations, or religious lawyers practising in religious courts.¹⁰⁷

Giba-Matthews endorses the prophetic model from a Catholic perspective, suggesting that a Catholic lawyer may not be in a position to separate her dual role as a representative of both church and state when it comes to pro bono work, due to the importance placed by the Roman Catholic Church on showing concern for the poor.¹⁰⁸ This may lead to an increased commitment to pro bono lawyering.¹⁰⁹

103 Adrian Evans, 'Encouraging Lawyer's Values in a Faith Conscious World' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005) 6, 6.

104 Schutt, above n 22, 202–3.

105 See Parker, 'Christian Ethics in Legal Practice', above n 20, 29–30. In so doing, however, the lawyer effectively brings his professional skills to his personal role, rather than vice versa.

106 DiSalvo and Droel, above n 27, 132.

107 Levinson, above n 34, 1596, with reference to Jewish lawyers practising in Jewish courts.

108 F Giba-Matthews, 'A Catholic Lawyer and the Church's Social Teaching' (1998) 66 *Fordham Law Review* 1541, 1543–4. Starr similarly notes the biblical imperative to 'stand up for the rights of the orphan, the widow, and the alien': Kenneth W Starr, 'Christian Service in the Practice of Law' (2005) 32 *Pepperdine Law Review* 451, 453.

109 Starr suggests that Christian lawyers in large law firms have a particular obligation to undertake pro bono work and that '[i]t would be odd for the Christian lawyer not to have a cup filled to overflowing with non-remunerative matters': *ibid* 456.

From a Jewish perspective, the view that a lawyer ought to use her role to further justice and support those who are disadvantaged is shared by a number of Jewish theorists. Schorr states, 'I view it as a mandate to myself to use my work as a lawyer to better the circumstances of those currently denied justice, fairness and the opportunity to pursue wellbeing'.¹¹⁰

The Prophetic Lawyer is also encouraged to be actively involved in law and social reform, becoming involved in lobbying, and acting for and advising clients and organisations that fit with the lawyer's own reform agenda. The view that the Christian or Jewish lawyer should not simply accept the law and legal institutions as they are, but should examine them in the light of faith-based values, is advocated by a number of religious ethicists.¹¹¹

On the face of it, the Prophetic Lawyer is less likely to experience a conflict between her contemporaneous obligations to church and state because she is actively involved in giving expression to the moral values of her church through her professional role. However, imagine that the Prophetic Lawyer is giving expression to her faith-based social justice values by working for a community legal centre, specialising in assisting refugees and asylum seekers. One day she is approached by a client who seeks asylum on the basis that he will be persecuted for his homosexuality if forced to return to his home country.¹¹² If this conflicts with the Prophetic Lawyer's personal moral values,¹¹³ then she still faces an underlying question about how to reconcile those values with the action she is required to take in her professional role. Similarly, the Prophetic Lawyer may seek to give expression to her faith by acting for her Church or religious organisation, but, in the example of a lawyer asked to act for the Church against allegations of abuse, nevertheless faces questions about how to balance the competing claims of her client, community and the claimant. This model is more cursory than other models in that it fails to deal with the underlying ethical conflicts that are still likely to arise even when the Prophetic Lawyer chooses to act for clients or causes that may initially seem to fit with the ethical values of her church.

In practice, this model is more likely to be combined with other models, particularly for those lawyers who work in secular legal practice environments. For example, the Servant Lawyer, whilst remaining morally neutral in her day-to-day legal practice, may nevertheless give expression to the ethical values of her

110 Rabbi Gerald Wolpe et al, 'Panel Discussion: Responses to the Keynote Address' (1999) 26 *Fordham Urban Law Journal* 841, 848 (Nanette H Schorr). This view is shared by Pearce, who writes 'the conduct of the Jewish lawyer in upholding the rule of law and in serving the poor could be quite consistent with professional ideals': Pearce, 'The Jewish Lawyer's Question', above n 30, 1269. Levine similarly argues that pro bono work, protecting the rights of the needy, and working to ensure justice for the downtrodden and disadvantaged are consistent with a faith-based conception of lawyering: Levine, 'A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics and Tradition: A Conceptual Overview', above n 78, 21.

111 Particularly in Shaffer's later work: see, eg, Thomas L Shaffer, 'Lawyers as Prophets' (2003) 15 *St. Thomas Law Review* 469; Allegritti, above n 21, ch 4 'Prophetic Ministry'.

112 Based on the 'Mr J' scenario referred to above.

113 Which was the case for the lawyer in the 'Mr J' scenario but might not be the case for all Christian or Jewish lawyers.

church by engaging in pro bono work, becoming involved in a church committee or serving on the governing body of an organisation which reflects those values.

VII CONCLUSION

In this article I have examined the Christian and Jewish literature about lawyers' ethical decision-making, and have sought to identify four different models for reconciling the sometimes competing demands of church and state within that literature.

As noted above, there are parallels between some of the faith-based models and the secular models identified by Parker.¹¹⁴ Like the Adversarial Advocate, the Servant Lawyer puts aside faith-based moral values in favour of professional ethical norms when undertaking her professional role. However, for the Servant Lawyer, this is justified with reference to faith-based principles rather than the liberal concept of individual autonomy that is often used to justify the amoral stance of the Adversarial Advocate.¹¹⁵ As Mortensen identifies, although both liberal and Christian traditions share a level of support for individual autonomy,¹¹⁶ the Christian's autonomy is ultimately limited by her obligation to God.¹¹⁷ This difference is reflected in even the most liberal of the faith-based models,¹¹⁸ which recognise that there may be a point at which the Christian or Jewish lawyer is unable to separate personal values from professional role and will be unable to act.

There are also similarities between the Moral Activist, who pursues her own concept of 'justice' through her work as lawyer,¹¹⁹ and the Prophetic Lawyer, who pursues faith-based law reform and social justice, rather than her own personal concept of what is 'right'. Again, each of these models responds to the secular Western legal system, but reflects the difference between the liberal view that moral standards emanate from individual human reason, and the religious tradition, in which faith and morality are inextricably intertwined and moral standards are external to the person of the lawyer.¹²⁰

The influence of Jewish and Christian philosophy on the development of the Western legal tradition is highlighted in a number of models. The Servant Lawyer is able to identify parallels between Christian and Jewish values and the values of modern liberal democracy in order to justify the lawyer's role within that system, whilst the Lawyer of Character is able to reconcile her dual role as a member of both church and state by identifying similarities between biblical and professional virtues. As noted above, the influence of Aristotelian philosophy on Christian philosophers is particularly evident, as there is a greater level of comfort in

114 Parker, above n 9, 56; Parker and Evans, above n 9, 22–9.

115 Mortensen, above n 21, 394.

116 But disagree as to the source of that autonomy: *ibid* 404.

117 *Ibid* 403.

118 The Servant Lawyer.

119 Parker, above n 9, 56; Parker and Evans, above n 9, 38–42.

120 Mortensen, above n 21, 404–5, 407.

identifying parallels between 'Christian' values and professional virtues within the Christian literature than the Jewish literature.

Similarly, there is a difference between Christian and Jewish approaches to the integration of religious moral values and the professional role. The dominant Christian approaches require the lawyer to act consistently in both personal and professional roles, whereas there is greater recognition that the roles might be separated within the Jewish literature. This may reflect the historic coexistence of (Christian) church and state in the Western legal system, as well as post-Reformation teachings about the concept of vocation and the spiritual significance of work.¹²¹

Like Parker's approaches to lawyers' ethical decision-making,¹²² the faith-based models represent a smorgasbord of perspectives, and require judgment by individual lawyers about how and why a particular approach may be justified in different circumstances. It is also possible for lawyers to combine aspects of different models, for example by adopting professional values in a secular work environment, but giving effect to faith-based social justice values by engaging in pro bono work either within or outside that environment.

To an extent, there are no easy answers to the question whether the ethical values of church and state can coexist in a secular legal system. As Osler notes, 'the Christian [or Jewish] lawyer is distinct not because she has neatly reconciled competing agendas, but because she *has not*. What makes her different is the continuation of the internal struggle to reconcile conflicting moral demands'.¹²³ The faith-based models for legal practice provide ways for a Christian or Jewish lawyer to think about how to reconcile these conflicting demands, although the tension between the Christian or Jewish lawyer's obligation to God and her role as a lawyer within a secular liberal legal system may always remain.¹²⁴

121 See, eg, the discussion in Allegretti, above n 21, 27; Allegretti argues that his 'Transformist Model' for legal practice (which I have classified under the rubric of the 'Lawyer of Integrity') reflects both Protestant teachings about the concept of vocation (which recognises the integration of personal and professional roles) as well as the modern Roman Catholic position on the 'spiritual significance of work': at 28. The Lawyer of Integrity may also reflect recognition of the Catholic prohibition against cooperation in evil: Patrick Quirk, 'Marriage, Divorce and the Catholic Lawyer' (2002) 14 *Bond Law Review* 414, 420.

122 Parker, above n 9, 74.

123 Mark Osler, 'The Lawyer's Humble Walk' (2005) 32 *Pepperdine Law Review* 483, 486 (emphasis in original); see also Mortensen, above n 21, 407.

124 Mortensen, above n 21, 404–6.